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No. 1100

In the Supreme Court of the United States

OCTOBER TERM, 1967

RABINER & JONTOW, INC., A CORPORATION NOW KNOWN AS ABBE RABINER, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JAMES McI. HENDERSON,
General Counsel,
Federal Trade Commission,
Washington, D.C. 20580.

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After extensive administrative proceedings, the Federal Trade Commission adopted its hearing examiner's findings (J.A. 13a–73a)[1] that petitioner, a manufacturer of women's coats and suits, had granted cooperative advertising allowances to six large retail stores in Boston, New York, and Washington in the years 1960 through 1962, without making such allowances available on proportionally equal terms to competitors of the favored customers,[2] in violation of

[1] "J.A." refers to the joint appendix in the court of appeals.

[2] Petitioner conceded that it had made the discriminatory payments (Pet. 6–7; see Pet. App. 3a, n. 2).

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Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(d), and that petitioner had failed to establish that its discriminatory advertising payments were made in good faith to meet allowances granted by its competitors (J.A. 83a). The Commission rejected petitioner's claim that the proceedings against it were not in the public interest because other firms in the wearing apparel industry were engaging in the same illegal practices (J.A. 76a–80a). Accordingly, the Commission affirmed the decision of the hearing examiner and approved without modification the initial cease-and-desist order entered by him against petitioner (J.A. 72a–73a, 11a).

The complaint against petitioner represented one aspect of the Commission's efforts to deal with the problem of discriminatory advertising allowances in the wearing apparel industry. Having determined, as a result of an investigation begun in 1961, that the practice of granting such allowances was widespread, the Commission offered manufacturers believed to be thus violating the law an opportunity to consent to the entry of cease-and-desist orders. From 1962 through 1964, some 310 manufacturers of wearing apparel, including petitioner, were invited by the Commission to agree to the entry of such consent orders; 298 of them did so.[3] When petitioner declined, the instant proceeding was instituted (J.A. 117a–119a; Pet. App. 2a–3a; see *Abby Kent Co., et al.*, CCH Trade Reg. Rep. (1965–1967 Transfer Binder) ¶ 17, 310).

[3] The orders against all 298 consenting manufacturers were made effective simultaneously on August 9, 1965 (J.A. 77a).

In the court of appeals, petitioner did not dispute the Commission's finding that it had violated Section 2(d) (Pet. App. 4a). Rather, it contended that the Commission had acted arbitrarily by proceeding against it while some of its competitors remained free to continue similar unlawful practices, and asked that the order against it be set aside.[4] The court of appeals, after reviewing the decisions of this Court in *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, and *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, held that petitioner had not shown that the Commission had abused its discretion and affirmed the Commission's order (Pet. App. 6a, 9a).

The sole question which petitioner presents to this Court is whether the court of appeals erred in refusing to stay the Commission's order (Pet. 2). We submit that the decision of the court of appeals is correct and that there is no occasion for further review.

1. Petitioner asserts that the court of appeals improperly read the decisions of this Court in *Moog Industries*, and *Universal-Rundle* as placing "in the hands of the Commission sole authority" to determine "whether or not it had acted arbitrarily" and as withdrawing that question from judicial examination (Pet. 14). This suggestion is clearly without merit.

[4] The court of appeals treated the request as one for a stay of enforcement of the cease-and-desist order, noting that petitioner would not be entitled to have the order set aside even if its claim of abuse of agency discretion were sustained (Pet. App. 4a).

Indeed, the court below, observing that this Court in *Moog Industries* had "noted the peculiar discretion given to the Commission in the shaping of its remedies" (Pet. App. 4a), expressly referred to and applied (Pet. App. 6a) the standard of review stated by this Court in *Universal-Rundle, supra,* 387 U.S. at 250:

> * * * [T]he reviewing court's inquiry is not whether the evidence adduced in support of a petition for a stay tends to establish certain facts, such as that the industry is engaged in allegedly illegal price discrimination practices; rather, the court's review must be limited to determining whether the Commission's evaluation of the merit of the petition for a stay was patently arbitrary and capricious.

The court of appeals found that "there is no indication that the Commission acted arbitrarily in proceeding against petitioner" (Pet. App. 6a), and thus made precisely the kind of judicial determination called for by *Universal-Rundle*. Moreover, the court below noted that "the Commission appears to have made every effort to achieve industrywide compliance in as equitable a manner as possible under the circumstances" (Pet. App. 7a).

2. Moreover, the court of appeals was plainly correct in concluding that petitioner had failed to establish that the Commission's proceeding against it constituted a patent abuse of discretion. As the court pointed out (Pet. App. 6a):

> An extensive industry-wide investigation was conducted and almost 300 consent orders were obtained before the present action was taken. The Commission held public hearings on how

> enforcement could best be achieved and various proposals were submitted from industry representatives. Even then, the Commission considered the possible competitive disadvantage its orders might have and waited until 1965 to make those orders effective. *Abby Kent Co., et al.*, FTC Docket No. C–328 *et al.* (August 9, 1965), CCH Trade Reg. Rep. (1965–1967 Transfer Binder) [¶ 17,310] at p. 22,461.

Abby Kent Co. makes it clear that the Commission carefully considered the various means available to it for bringing about a cessation of the unlawful practices it had discovered, and that it deferred the effective date of the consent orders so as to secure compliance from as many firms as possible. The order against petitioner was entered by the hearing examiner on July 16, 1965 (J.A. 73a); on August 9, 1965, the Commission made effective the orders covering the 298 consenting firms (J.A. 77a); and on September 19, 1966, the Commission affirmed the order against petitioner (J.A. 11a–12a).

Petitioner contends, however, that of the 298 wearing apparel firms against which consent orders were obtained, only seven were, like petitioner, manufacturers of women's coats and suits; that there are some 500 such firms not under such an order;[5] and, therefore, that petitioner will suffer competitive harm

[5] Petitioner's reference to some 500 competitors is an exaggeration. Petitioner's own expert witness determined that, in 1963, the number of firms in the entire United States whose merchandise was sold in the same "price zone" as petitioner's was 161 (J.A. 113a–114a, 38a–40a, 104a–106a); this figure doubtless includes firms which did not sell in the same cities and to the same customers as petitioner.

because of the instant proceeding and the resulting order (Pet. 11). This contention was fully considered and was rejected by the court of appeals. The court noted that "[p]etitioner has not shown that violations of Section 2(d) are prevalent in that segment of the industry in which it operates"; that "[p]etitioner has failed to show that compliance with the Commission's order will place it at a competitive disadvantage"; that the "Commission is continuing to take action against violators," citing a number of Commission proceedings; and that the Commission's order leaves petitioner "free to establish its own nondiscriminatory promotional plan and, when necessary, offer certain customers the same amount as a competitor whose allowance it may have to meet [so as to] minimize any competitive disadvantage" (Pet. App. 7a–9a).[6]

[6] Petitioner suggests, apparently for the first time, that, under the instant cease-and-desist order, it could meet only lawful promotional allowances given by competitors (see *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231), and that this group would include "at most 7 companies who have filed lawful plans" (Pet. 13–14). This is speculation without support in the record. Petitioner did not demonstrate that its competitors other than the seven "who have filed lawful plans" are in fact granting unlawful advertising allowances. As the court of appeals noted (Pet. App. 8a): "Although petitioner alleges that widespread violations do in fact remain in the industry, it has never provided the Commission with names or other information upon which the Commission could take appropriate action." Moreover, even if some of petitioner's competitors are granting unlawful allowances, the court of appeals pointed out that the "Commission is continuing to take action against violators" (*ibid.*). In any event, the existence of similar violations by petitioner's competitors does not, of itself, require that the order against petitioner be stayed. See *Universal-Rundle*, *supra*, 387 U.S. at 251.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JAMES MCI. HENDERSON,
General Counsel,
Federal Trade Commission.

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